SUPREME COURT OF THE UNITED STATES.

[redacted]

OCTOBER TERM, 1904.

No. 60.

Office Supreme Court U. S.
FILED
NOV 8 1904
JAMES H. McKENNEY,
Clerk

SPENCER S. BULLIS,
Plaintiff in Error,

vs.

JAMES R. O'BEIRNE, ON BEHALF OF HIMSELF AND ALL OTHER BONDHOLDERS OF THE ALLEGHENY & KINZUA RAILROAD COMPANY, AND CENTRAL TRUST COMPANY OF NEW YORK.

ARGUMENT FOR DEFENDANTS IN ERROR.

FRANK SULLIVAN SMITH,
ADRIAN H. JOLINE,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

SPENCER S. BULLIS,
Plaintiff in Error,

vs.

JAMES R. O'BEIRNE, on behalf of himself and all other bondholders of The Allegheny & Kinzua Railroad Co., and Central Trust Company of New York,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF NEW YORK.

ARGUMENT FOR DEFENDANTS IN ERROR.

Statement.

The assignment of error herein brings before this Court for review the orders of the Supreme Court and its Appellate Division for the Fourth Judicial Department and of the Court of Appeals of the State of New York adjudging that the plaintiff in error is not entitled to an order directing the cancellation, under § 1268 of the New York Code of Civil Procedure, of a judgment rendered June 29, 1896, in favor of the defendant in error James R. O'Beirne for $3,586.40 and in favor of

the defendant Central Trust Company of New York for $341,745.65 against the plaintiff in error and Mills W. Barse, adjudging that the plaintiff in error pay to the said judgment creditors the sum of $143.71 costs, and refusing to give effect to the discharge in bankruptcy granted to the plaintiff in error September 19, 1899, under the Bankruptcy Act approved July 1, 1898.

The judgment in favor of the defendant in error James R. O'Beirne was for costs and an allowance in addition to costs, and in favor of the defendant in error, Central Trust Company of New York, for the equal *pro rata* benefit of said O'Beirne and all other holders of the bonds of The Allegheny & Kinzua Railroad Co., in an action brought July 16, 1891, in the Supreme Court in and for the County of New York, wherein said James R. O'Beirne, on behalf of himself and all other bondholders of said railroad company, was plaintiff, and said Spencer S. Bullis, Mills W. Barse, The Allegheny & Kinzua Railroad Co. and Central Trust Company of New York were defendants (Transcript, fols. 638-644).

The suit was brought for the purpose of obtaining specific performance of covenants made by said Bullis, Barse and the Railroad Company based upon false pretenses and fraudulent misrepresentations of fact, or, in the alternative, for damages equivalent to the loss suffered by the plaintiff and his co-bondholders by reason of the fraud perpetrated upon them by the defendants Bullis and Barse. The cause came on for trial before Mr. Justice TRUAX, at Special Term, October 7, 1892. Upon the trial the impossibility of the performance of their covenants by Bullis and Barse was established and the Court directed a judgment of dismissal of the complaint, holding that it had no power to retain the case for the purpose of assessing damages for the fraud. Upon appeal to the General Term, First Department, the judgment was reversed and a new trial ordered (80 Hun, 570). The Railroad Company stipulated for judgment absolute and appealed to the Court of Appeals from the order of reversal, which order the Court of Appeals affirmed (158 N. Y., 466). Bullis and Barse de-

fended upon the new trial before Mr. Justice Barrett, which resulted in the judgment from which the plaintiff in error seeks discharge. An appeal was taken to the Appellate Division, First Department, and the judgment was affirmed (2 App. Div., 545). Upon appeal to the Court of Appeals the judgment of the Appellate Division was affirmed (158 N. Y., 466).

On or about the 8th day of July, 1901, the said Bullis petitioned the Supreme Court of New York, at the Erie County Special Term for an order declaring said judgment cancelled and discharged as to him, upon his discharge in bankruptcy granted September 29, 1899 (fols. 702-722). The application was denied by the Court upon the merits August 26, 1901 (fols. 731-735). An appeal to the Appellate Division, Fourth Department, was taken September 18, 1901 (fols. 737-740), and the order was unanimously affirmed by the Appellate Division, January 7, 1902, Mr. Justice Spring giving the opinion of the Court (7 Am. B. R., 238; 68 App. Div., 508) (fols. 749-824). January 31, 1902, an appeal was taken to the Court of Appeals (fols. 826-828), and the order was affirmed June 27, 1902, without opinion, and September 29, 1902, the judgment of said Court was made the judgment of the Supreme Court (fols. 209-212).

The Writ of Error to the Supreme Court of New York was granted May 18, 1903 (pp. 229-231).

The Nature of the Action and of the Judgment.

The nature of the action in which was obtained the judgment from which the plaintiff in error seeks a discharge and the facts established in the record were well stated by Gray, J., for the Court of Appeals (151 N. Y., 372, 377-383), as follows:

"The plaintiff, on behalf of himself as a bondholder of the defendant railroad company and of all other bondholders similarly situated, brought this action to compel the specific

performance of certain agreements, whereby some 46,000 acres of timber land, in the aggregate, contiguous or tributary to the line of the railroad, were to be conveyed to the trustee in the mortgage made by the railroad company; or to compel the defendant to pay the trustee, for the security of the bondholders, the value of said lands. The defendants against whom this relief is prayed are The Allegheny & Kinzua Railroad Company and two certain persons named Bullis and Barse. It seems that in 1889 there were two partially completed railroads in Pennsylvania operated by the Bradford & Corydon Railroad Company and The Allegheny & Kinzua Railroad Company. There was also in New York a partially completed railroad operated by a corporation of the same name as the one in Pennsylvania, viz.: The Allegany & Kinzua Railroad Company. Of these three railroad companies the defendants Bullis and Barse owned and held all the capital stock. These railroads penetrated a large tract of timber lands in McKean county, Pa. Bullis and Barse devised a scheme, in connection with a firm of New York brokers, styled Newcombe & Co., for the reorganization of the two Pennsylvania companies, and in pursuance thereof an agreement was entered into between them on October 8th, 1889, which recited that Bullis and Barse were the owners and holders of the capital stock of the companies and that they were also owners of, or controlled 30,000 acres of land in McKean County, on which were extensive and valuable tracts of timber, the product of which they were desirous of marketing through the completion of the railroads. It provided that Bullis and Barse should cause to be executed a mortgage, or deed of trust, upon the property and franchises of the railroad companies and upon these 30,000 acres of land to the Central Trust Company, as trustee, for the purpose of securing bonds to the amount of $250,000, which Newcombe & Co. agreed to sell upon certain terms. Bullis & Barse were to place the ownership and control of the railroad property and franchises and of the 30,000 acres of land in a new corporation, to be created under the laws of Pennsylvania. The lands so to be owned by the corporation and covered by the lien of the mortgage, or deed of trust, were to be contiguous or tributary to one or the other of the railroads and should be timbered and profitable to the corporation. Subsequently engineers were sent out, at the request of Bullis and Barse, by Newcombe & Co. and another concern, whom they had brought the matter before, who visited and inspected the timber lands

in McKean County. In consequence of their report and suggestions, the October plan was changed and a new and larger scheme was resolved upon on December 9th, 1889. Upon the visit of the engineers to the timber lands, Bullis had accompanied them, and had pointed out, somewhat indefinitely, what would be the boundaries of the 30,000 acres. All the lands shown were well timbered and were situated on either side of the line of the railroad. The agreement of December 9th, modifying that of October 8th, between Newcombe & Co. and Bullis and Barse, recited the ownership of the capital stock of The Allegany & Kinzua Railroad Company (the New York corporation) by Bullis and Barse, and that it was proposed to consolidate it with the two Pennsylvania companies mentioned in the October agreement. Bullis and Barse were to cause the merger and consolidation of the three companies to be effected, with a capitalization of $500,000 of stock and with a bonded debt of $500,000, secured by a mortgage to the Central Trust Company, as trustee, which should be a first lien upon the properties and franchises of the new corporation and should include 30,000 acres of timber land for the first 46 miles of railroad constructed and completed, and 16,000 acres for the additional 24 miles of railroad to be constructed. Only $300,000 at par value of the bonds were to be put upon the market at first, representing 46 miles of the said railroads, and the remaining $200,000 were reserved for the purpose of completing the extensions of the roads. Newcombe & Co. were to negotiate the sale of bonds at par upon certain terms and conditions. Bullis and Barse were to cause a contract to be entered into with The Interior Construction & Improvement Company, a New Jersey corporation, for the purpose of effecting the proposed merger and consolidation of the several railroads and the issue by the new corporation of said capital stock and bonds. On the same day, accordingly, there was an agreement made between The Interior Construction & Improvement Company and the New York corporation of The Allegany & Kinzua Railroad Co., whereby the former company agreed to effect the proposed consolidation; to complete the construction of the railroads without delay, and to extend them so that the consolidated company should own a completed road of 70 miles in length. This agreement provided for the issuance by the consolidated company of $500,000 in bonds, to be secured by a mortgage which was to cover, in addition to the railroad properties and franchises, 1,000 acres of timber land for each mile of rail-

road constructed and completed, contiguous or tributary to the consolidated railroad, in this manner, viz.: For the first 46 miles of railroad so completed 30,000 acres and for the additional 24 miles of railroad to be completed 16,000 acres. This agreement was executed on behalf of the railroad company by the defendant Bullis, as its president. On the same day, another and third agreement was made between The Interior Construction, &c., Company and Bullis and Barse, which refers to the previous agreement and states the disposition to be made by The Interior Construction &c., Company, of the bonds and stock of the new corporation. By that agreement Bullis and Barse, among other things, agreed to cause the proper amount of timber land to be placed under the lien of said mortgage or deed of trust, to be executed by said merged and consolidated corporation, as provided in said agreement; thereby referring to the one previously described between the construction company and The Allegany & Kinzua Railroad Company of New York. The consolidation of these three railroad corporations was effected in February, 1890, under the name of the present defendant, The Allegheny & Kinzua Railroad Company, and thereupon the new company executed and delivered to the defendant the Central Trust Company, as trustee, its mortgage to secure bonds for the aggregate amount of $500,000, par value. This mortgage by its terms covered all the railroad properties and franchises, and the defendant Bullis and his wife united in its execution, as it is expressly found, with the knowledge and approval of the defendant Barse. There was a recital in the mortgage that Bullis was the owner in fee of the real estate thereinafter described and it purported to convey to the trustee, on the part of Bullis and his wife, numerous tracts and parcels of land, to the extent of 30,954 19/100 acres. There was also a covenant by the mortgagors that the railroad company should cause to be conveyed to the trustee, in addition to the 30,000 acres of timber land conveyed by that instrument, 16,000 more acres, as a further security for the payment of bonds, upon the completion by the railroad company of the 70 miles of railroad. It was found as a fact by the trial judge, that the execution of this mortgage by Bullis and wife was in apparent and partial performance of the undertakings and contracts contained in the earlier agreements and of the scheme of consolidation and extensions. The bonds were executed and delivered by the railroad company to the trustee, and of the $300,000 which were to be presently

disposed of all but $40,000, which Newcombe & Co. retained for their commissions, were duly sold by that firm to the plaintiff and his co-bondholders in good faith, and the finding further is that the proceeds of these $260,000 of bonds were applied to the extinguishment of liens and to the construction of 46 miles of railroad, $125,000 being the proceeds of the sale at par of $125,000 of these bonds, were paid over to the defendants Bullis and Barse, for the purpose of extinguishing liens and incumbrances upon the properties of the various constituent companies. It was also found as a fact, that the bonds were retained and sold by Newcombe & Co. with full knowledge and reliance upon the said several agreements * * * and particularly upon the provisions contained therein for the conveyance to the defendant trust company of 30,000 acres of timber land, as a further security for said bonds, of the character described in said agreements and of the kind and value stated and described by said defendants Bullis and Barse. It was also found in substance, that the defendants Bullis and Barse at the time of the agreements which have been described, had represented to Newcombe & Co. that the said 30,000 acres of land were timbered, clear of incumbrances, contiguous to the line of railroad, as the same was constructed and projected, and that said land was covered by merchantable timber sufficient to provide a railroad with, at least, 70 tons of freight to the acre for conveyance over the railroad at certain rates. It is also found that Newcombe & Co. approved and accepted the said mortgage, relying upon the representations of Bullis that he was the owner of the tracts of land described therein, and believed that, by reason of such representations, Bullis and Barse were in good faith performing their covenants and agreements in that behalf, and in reliance thereon they proceeded to perform their agreements with said Bullis and Barse. Bullis and Barse failed and refused to continue the work of construction in August, 1890. Certain findings of fact show that of the lands mentioned and described in the mortgage, some portions were not owned by Bullis at the date of its execution; that some portions were not timbered, or had all the timber removed from them; that Bullis did not have the title to the soil of some portions; that he did not have free and unincumbered title as to certain portions, and that 'of the lands mentioned and described in the said mortgage, 1,900 acres thereof * * * were owned by said Bullis at the date of said mortgage.' The finding also is that Bullis has not since

acquired good and sufficient title to the land described in the mortgage.

These findings have ample support in the evidence; but the court at Special Term dismissed the complaint; holding that a specific performance could not be decreed, because there was no proof as to what lands were owned or controlled by the defendants Bullis and Barse, except the lands described in the mortgage. Upon appeal to the General Term, that court agreed with the trial court that specific performance of the contracts could not be decreed; but held that the damages sustained by the plaintiff might be recovered in such an action, where it appeared that though he was entitled to equitable relief, yet it would be unavailing if granted, because of the defendants' inability to perform. The General Term assumed, in the absence of any explanation appearing in the record, that the trial court must have dismissed the complaint upon the theory that as equitable relief could not be granted, the plaintiff was not entitled to legal relief; an assumption which, it must be conceded, is the only one permissible upon the case. The General Term was undoubtedly right in holding as they did. The plaintiff has set forth in his complaint all the facts constituting a cause of action for specific performance, and, upon it appearing that that relief could not be granted, he had at least the right to a new trial wherein he might establish his claim for the damages sustained by a breach of the covenants and agreements relied upon (Sternberger *v.* McGovern, 56 N. Y., 12; Margraf *v.* Muir, 57 N. Y., at p. 159). The trial Court might have retained the cause, to grant such legal relief as might be just (Cuff *v.* Dorland, 55 Barb., 481)."

Judge GRAY thus defines the nature of the action (151 N. Y., at p. 384):

"The theory of the complaint and the tendency of the proof upon the trial were that a *fraudulent scheme was devised by Bullis and Barse, having for its object the consolidation of certain railroad properties, owned and controlled by them, and the issuance of a large number of bonds by the consolidated company, which should be placed with the public at par through the co-operation of Newcombe & Co., whose assistance to the scheme, in the negotiation of the bonds, should be gained by representations and agreements of such a nature, as to the timber tracts to be furnished as additional*

security under the mortgage, that the bonds would appear to be attractive and salable securities. We are not called upon, at the present time, to pass upon the liability of Bullis and Barse for the parts they have played in the development and consummation of this scheme, inasmuch as they have gone back to a new trial; but, on the face of this record, that the evidence amply warranted the findings by the trial Court is not to be denied, and it would have justified the granting of relief to plaintiff had the case been in a shape to make that possible."

Upon the appeal from the judgment of Justice TRUAX dismissing the complaint upon the ground that impossibility of performance, although not pleaded, appeared in the proofs, the General Term (80 Hun, 570), reversing the judgment of dismissal and directing a new trial, laid most emphatic stress upon the fraud underlying the scheme of Bullis and Barse and forming the basis of the claim for damages. Said Mr. Justice FOLLETT (pp. 573, *et seq.*).

"The facts found by the Court upon uncontradicted evidence conclusively show that Spencer S. Bullis and Mills W. Barse perpetrated an *atrocious fraud* upon I. B. Newcombe & Co., the trust company and *every person purchasing the bonds secured by the mortgage.* It is found (findings 28 and 29) that the agents of I. B. Newcombe & Co. were escorted by Bullis, at the request of Barse, through large tracts of heavily timbered land in McKean County, near the railroads, who reported its value to the firm *by which report they were induced to attempt to negotiate the bonds.* A clear understanding of what these individual defendants intentionally accomplished cannot be better disclosed than by quoting the findings of the Court."

The court then proceeded to quote in detail the 25th, 46th, 47th, 52d, 53d and 54th findings, showing the failure of the title of Bullis to the lands in question and the condition and value of those lands, and summarized its conclusions as follows (p. 575):

"*These findings are sufficient to show the magnitude and character of the fraud perpetrated by Bullis and Barse.* By

the forty-ninth and fiftieth findings it appears that much of the land mortgaged was of little value, and by the fifty-first finding, instead of such land being included in the mortgage, that land of the value of at least eighteen dollars per acre should have been included in order to constitute a compliance with the contracts of Bullis and Barse. These findings, in connection with the fact that 4,379 acres of land was valued by the appraisers at one dollar per acre, sufficiently show the value of the land included within the mortgage."

Upon the trial of the cause before Mr. Justice BARRETT, in directing the entry of the judgment set forth in the Transcript (fols. 638-644), he handed down an opinion in which the nature of the action is clearly stated. The opinion, as it appears in the Appeal Book in the Court of Appeals, pages 1493, 1494, is as follows:

"I shall not attempt to go over the points made in the elaborate briefs submitted by counsel in this case. In view of the decision of the General Term upon the first appeal (80 Hun, 570), the main question now presented is one of fact. If the *fraud originally found* has been established then the legal consequences pointed out by the General Term follow. Whatever my own understanding of the law may be I am, of course, bound by the views there expressed. The Court plainly held that even where the inability to decree specific performance existed at the time of the commencement of the action, *the damages sustained by the defendant's fraud may be recovered in the same action.* It also held that where the property which the defendants agreed to place under the mortgage was wanting, they could be required to pay its value to the mortgage trustee for the benefit of the bondholders. Upon the question of fact I am entirely with the plaintiff. The defendants have now been fully heard, and yet the fraud found upon the first trial has not been diminished. Without minutely analyzing the great mass of evidence which has been placed before me, I have no hesitation in giving my verdict (so to speak) for the plaintiff upon all the testimony. The impression which I derived from the trial was that the plaintiff's witnesses were entitled to the fullest credit. I regret to say that I did not derive the same impression with regard to Messrs. Bullis and Barse. Nor is my conclusion upon that head founded solely upon the manner and bearing of the wit-

nesses. The testimony of the plaintiff's witnesses carries conviction inherently. It is favored, too, by the probabilities of the case and by the surrounding circumstances. *The more I reflect upon the testimony adduced, the clearer becomes the fraud perpetrated by the defendants. That fraud was severely characterized by Mr. Justice Follett in delivering the opinion of the General Term, and his characterization fittingly applies to the present conclusion upon the whole case.* It follows that the plaintiff is entitled to the relief asked. He is not confined to his own damages. His action is brought to secure the payment to the trustee of the value of the lands which should have been placed under the lien of the mortgage. That relief under the decision of the General Term is appropriate and should be afforded with costs."

Mr. Justice BARRETT upon the conclusion of the trial, made 169 findings of fact and 15 conclusions of law at the request of the plaintiff (Transcript, fols. 476-637), among which are the following:

Findings of Fact.

"XCII.—That relying upon the representations of said defendant Bullis that he was the owner of the said described tracts and parcels of land and had good right to convey the same, made by his joining in the said mortgage (Exhibit 'D') and believing that said representations were true, and that by reason thereof said Bullis and Barse were in good faith performing their said covenants and agreements in that behalf, the said firm of I. B. Newcombe & Company approved and accepted the said mortgage, and in reliance thereof proceeded in all respects to carry out and perform their agreements with said defendants Bullis and Barse in reference to said lands.

XCIII.—That the statements and representations of said defendants Bullis and Barse with respect to said timber lands, mentioned and referred to in said Exhibits "A," "B" and "C," and Schedule "A" annexed to the complaint, were fraudulent and made with intent to deceive.

XCIV.—That the plaintiff was in fact deceived by said statements and representations.

XCV.—That said statements and representations were false and untrue.

XCVI.—That said agreement was in fact fraudulently made with respect of the lands agreed to be conveyed by said Bullis and Barse.

CXI.—That the value of said lands the soil of which was owned by the defendant Bullis, at the date of said mortgage, but which were not timbered, is $13,350.

CXII.—That the value of said lands which were not owned by said defendant Bullis at the date of said mortgage is $175,502.77" (fols. 556-560; 573-574).

Conclusions of Law.

X.—That this Court has jurisdiction to proceed in this cause by reason of fraud practiced by the defendants Bullis and Barse in the premises.

XII.—The fact that the plaintiff has been deceived by the fraudulent statements and misrepresentations of the defendants is sufficient of itself to cause a court of equity to entertain this suit (fols. 632-634).

The basis of the action was fraud as found by Mr. Justice BARRETT; and his ruling was affirmed by the Appellate Division (2 App. Div., 545), the Court saying (pp. 551 to 552).

"A careful examination of the testimony has satisfied us that the findings of fact by the Court below were amply sustained by the evidence, and we are clearly of the opinion that upon those findings the plaintiff was entitled to the relief granted to him by the judgment."

Upon appeal from the decision of the Appellate Division, the Court of Appeals (158 N. Y., 466) affirmed the judgment and order appealed from and adhered to its former definition of the nature of the cause of action involved.

Said the Court, *per curiam* (p. 468):

"*The right to maintain the action and the right of recovery as established by the decision of the Court upon that appeal were based upon substantially the same facts as exist in this case, and consisted chiefly of the agreements, representations and fraudulent conduct of the present appellants.* While it was then said that we were not required to pass upon the liability of the present appellants, still, it is manifest that that decision necessarily, although perhaps indirectly, involved the question of their liability. The theory upon which the decision proceeded was that they devised a fraudulent scheme for the consolidation of certain railroads owned and controlled by them, issued bonds upon false representations as to the timber lands to be furnished as added security under the mortgage to make the bonds secure and salable, that upon these facts the Court would have been justified in granting relief to the plaintiff against them, and that the corporation, having been the instrumentality employed by them, was also liable. Thus it was that the liability of the appellants was involved in that decision. *We adhere to the principle of our decision upon that appeal.*"

That the basis of the action was fraud is apparent from the complaint. It is therein alleged that "Bullis and Barse *falsely* and *fraudulently pretended* and *represented*" that the "30,000 acres of timber land was free and clear from all encumbrances * * * and that said land was covered by a large quantity of merchantable timber," etc. (fols. 16, 17, 34, 39); that the bonds of the railroad company were issued and sold to purchasers who *knew* and *relied upon* the *pretended* conveyance of 30,000 acres of timber lands (fols. 45-6); that such *pretended* conveyance was *false* and *fraudulent* in the particulars set forth in detail, " all of which the said defendants Bullis and Barse *well knew* at the time they made, or caused to be made, the said *pretended* conveyance of said 30,954.19 acres of land, as well as when they entered into said several agreements and made the said *false* and *fraudulent representations*"; "that by the *fraud* and failure of said defendants Bullis and Barse to cause a proper amount of timber land * * * to be conveyed to said trustee * * * and the failure of the title to a portion of said 30,954.19 acres of land mentioned

in said mortgage * * * a *great fraud* has been committed by said defendants, Bullis and Barse, upon the holders of such outstanding bonds" (fols. 51-59).

The record of the trial before Mr. Justice TRUAX shows, at page 129 of the Appeal Book, that counsel for Bullis and Barse said:

"If there be any cause of action alleged in this case, the cause of action is in fraud, and we demand a jury trial as a matter of right."

Upon the foregoing facts and in support of the contention of the defendants in error that the petition of the plaintiff in error that the judgment in question be canceled and discharged as to him was properly denied by the Courts of New York, attention is respectfully invited to the following:

ARGUMENT.

The claim sued upon and the judgment rendered thereon are not barred by the discharge in bankruptcy of the plaintiff in error, because their basis is his actual fraud.

The Bankruptcy Act of 1898 as well as that of 1867 expressly excepts a debt created by fraud from the operation of a discharge. The Act of 1898, Sec. 17, provides that,

"The discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another * * * (4) where created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The corresponding section of the Bankruptcy Act of 1867 provides (Sec. 33): "That no debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public

officer or while acting in any fiduciary character, shall be discharged under this act."

Mr. Justice Spring, for the Appellate Division, upon the affirmance of the order of the Special Term denying the petition of the bankrupt for discharge from the judgment, said:

"The action in which the judgments were rendered was not one at law for fraud and deceit, but was a suit in equity * * *

The action for specific performance in the strictest sense thereof *was founded upon the actual, positive fraud* of the defendants Bullis and Barse. * * * The gist, the intrinsic ingredient of the action, was consequently the *fraudulent scheme, the false representations* of these defendants. As was said by the Court of Appeals in its first review of the case (151 N. Y., at page 384): 'The theory of the complaint and the tendency of the proof upon the trial were that a fraudulent scheme was devised by Bullis and Barse. * * * when it developed upon the second trial that specific performance was unavailing, the Trial Court retained jurisdiction to proceed 'by reason of the fraud practiced by the defendants Bullis and Barse.' The backbone of the action, whether viewed strictly as one in equity or for damages in lieu of equitable relief to compensate the bondholders for the misconduct of the defendants, was the *fraud* of the latter" (Transcript, fols. 759, 797-801).

In every instance in which the case has been before the Courts of New York, it has been termed by judicial pronouncement *an action for fraud.*

Is the term "fraud" as thus applied to the case at bar equivalent in meaning to the word as used in the Bankruptcy Act?

The general rule is well stated under these statutes by Collier in his work on Bankruptcy (3d Ed., p. 681), as follows:

"It is the settled doctrine of the Court that 'Fraud' in the act of Congress defining the debts from which a bankrupt is not relieved by a discharge in bankruptcy, means positive fraud or fraud in fact involving moral turpitude or intentional wrong as does embezzlement, and not implied fraud or fraud in

law, which may exist without the imputation of bad faith or immorality" (citing):

Neal *v.* Clark, 95 U. S., 704, 709;
Wolf *v.* Stix, 99 U. S., 1, 7;
Hennequin *v.* Clews, 111 U. S., 676, 682;
Strang *v.* Bradner, 114 U. S., 555, 559.
Noble *v.* Hammond, 129 U. S., 65, 67.
Upshur *v.* Briscoe, 138 U. S., 365.

See also Brandenburg on Bankruptcy, Sec. 434.

Applying the test which this Court has established, through the opinion of Mr. Justice Bradley, in Hennequin *v.* Clews, *supra,* at page 681, which is the basis of Mr. Collier's text, to the fraud of the plaintiff in error, the facts meet every requirement of that test and are convincing, that "the fraud referred to * * * means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, * * * and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality."

In the case of Forsyth *v.* Vehmeyer, 177 U. S., 177, Mr. Justice PECKHAM, reviewing preceding authorities, reaches the following conclusion (p. 182):

"A representation as to a fact, made knowingly, falsely and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong. It is not necessary to enlarge upon the subject. It is so plainly a fraud of that description that its mere statement obtains our ready assent."

It is plain that the Courts which have passed upon the acts of Bullis and Barse, that were made the basis of the action against them, in applying the term "fraud" to those acts, intended to use the word as carrying with it the definition given to it by this Court. It already appears that in the General Term Mr. Justice FOLLETT said that they "perpetrated *an atrocious fraud,*" and that the findings were sufficient to show

the *magnitude* and *character* of the *fraud* perpetrated by them. Mr. Justice Barrett said: "The more I reflect upon the testimony adduced, the clearer becomes the *fraud* perpetrated by the defendants. That *fraud* was severely characterized by Mr. Justice FOLLETT, in delivering the opinion of the General Term, and *his characterization fittingly applies* to the present conclusion upon the whole case."

Mr. Justice BARRETT found that "the statements and representations of said defendants, Bullis and Barse, * * * were *fraudulent* and *made with intent to deceive*"; that "the plaintiff *was in fact deceived* by said statements and representations"; that the same were "*false* and *untrue*," and that the agreement between the parties "was in fact *fraudulently made* with respect of the lands agreed to be conveyed by said Bullis and Barse."

In the Appellate Division, Mr. Justice O'BRIEN said: "A careful examination of the testimony has satisfied us that the finding of facts by the Court below *were amply sustained by the evidence.*" In the Court of Appeals, upon the railroad company's appeal, Judge GRAY said:

"The theory of the complaint and the tendency of the proof upon the trial were that a *fraudulent scheme* was devised by Bullis and Barse."

Upon the appeal of Bullis and Barse, the Court said, referring to the railroad company's appeal:

"The right to maintain the action and the right of recovery * * * were based upon substantially the same facts as exist in this case, and consisted chiefly of the agreements, representations and *fraudulent conduct* of the present appellants. * * * We adhere to the principle of our decision upon that appeal."

This Court will accept the findings of the State Courts upon the subject of fraud as conclusive, as it did in the case of Forsyth *v.* Vehmeyer, *supra.*

If this Court will not rest upon the findings of the State Courts as to the existence and nature of the fraud for which

the judgment against the plaintiff in error was obtained, it will determine the same by the record upon which the judgment is based.

Brandenburg on Bankruptcy, Sec. 432, and cases cited.

Collier on Bankruptcy, p. 197, and cases cited.

In Warner *v.* Cronkhite, 13 N. B. R., 52 Fed. Cas. 17180, the action was to recover damages claimed to have been sustained by the plaintiff, by reason of alleged frauds practiced by defendant upon plaintiff in the sale of certain lands; it was *held* that a debt created by fraud is not discharged in bankruptcy, even though reduced to a simple judgment for money, in which there is no mention of fraud; if the original action was based upon fraud, the fraud is not merged in the judgment.

In Boynton *v.* Ball, 121 U. S., 457, 466, Mr. Justice MILLER said:

"This Court, to which this precise question is now presented for the first time, is clearly of opinion that the debt on which this judgment was rendered is the same debt that it was before; that, notwithstanding the change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been, by merger into a judgment of a Court of Record, it still remains the same debt on which the action was brought in the State Court, and the existence of which was provable in bankruptcy."

In re Patterson, 1 N. B. R., 307, Fed. Cas. 10817, Judge BLATCHFORD said:

"Wherever the debt, no matter whether it be in the shape of a judgment or in any other form, was created by fraud, had its root and origin in fraud, there it is not to be discharged."

There is no distinction between a fraud proven in a court of law and a fraud proven in equity.

In re Alsberg, 16 N. B. R., 116, Fed. Cas. 261.

A practical demonstration of the kind of fraud alleged and

proved against the plaintiff in error is suggested by *In re* Marcus, 105 Fed., 907, in which it was *held* that if the bankrupt is not entitled to be protected from arrest on an execution upon the judgment, he is not entitled to a discharge in bankruptcy. In the case at bar the plaintiff could have obtained an order of arrest and would have been entitled to a body execution against Bullis and Barse. Section 549, of the New York Code of Civil Procedure, provides that:

"A defendant may be arrested in an action as prescribed in this section, where the action is brought for either of the following causes: * * *

"Subd. 4. In an action upon contract, express or implied, other than a promise to marry, where it is *alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability.*"

Elwell *v.* Russell, 29 App. Div., 436.
Hoboken Beef Co., *v.* Loeffel, 52 Hun, 611; 23 Abbott's New Cases, 93.

It is stated by counsel for plaintiff in error that there is no allegation in the complaint that the contracts were entered into with a wrongful *intent* (page 8).

If the intent appears from other allegations in the complaint, it is not necessary to allege it in exact words.

Bank of Montreal *v.* Thayer, 7 Fed. R., 622;
Thomas *v.* Belle, 25 N. Y., 244;
Ross *v.* Mather, 51 N. Y., 108;
Miller *v.* Barber, 66 N. Y., 559;
Baird *v.* Malcolm, 2 John., 550;
Brady *v.* Finn, 162 Mass., 260,
38 N. E. Rep., 506;
Schoellhauer *v.* Rointesch (Ore. 1894), 38 Pac. R., 344.

As was stated by McCrary, C. J., in the Bank of Montreal *v.* Thayer, *supra*, "It is said that a fraudulent intent is not alleged; but it is difficult to see how representations as a

matter of fact can be wrongful, fraudulent and false without they are made with a fraudulent intent. It is certainly necessary to prove the intent, and of course it must be alleged, but no form of words is necessary. If the terms employed by the pleader taken in their ordinary signification, necessarily include the idea of a fraudulent intent, that is enough. We must give to the term 'fraudulent,' as found in the petition the meaning which the law gives it, and which attaches to it in common usage, to wit, a deliberately planned purpose and intent to deceive and thereby to gain unlawful advantage * * * it is not necessary in such a pleading to define the meaning of these terms, and to say that the representations were made with intent to deceive would add nothing to the allegation that they were falsely and fraudulently made."

Citing many cases.

The case of Miller *v.* Barber, *supra,* is directly in point, and is conclusive.

It appears to be too plain for extended argument that the plan or scheme, as shown by the record herein, and by all of the findings of the different courts, was of so wrongful, fraudulent and false a nature that it could not have been made without a fraudulent intent.

Indeed, were such a direct allegation necessary, it is submitted that an allegation of intent does exist in the complaint, as shown by the record herein, although the allegation does not make use of the specific word "intent." The allegation of paragraph "XVI" in the complaint is, in part, as follows:

"and plaintiff charges that *all of the acts* above mentioned of said defendants, Bullis and Barse, were and are made entirely *with the view of* increasing the value of their own property and generally in their own pecuniary interest, utterly regardless of the effect thereof upon the said railroad company and its finances" (fol. 83).

It cannot seriously be contended that acts which are done and representations made "*with a view of*" deceiving and defrauding have not the same meaning as acts done and representations made with *intent* of defrauding.

There is no foundation for the claims of counsel for plaintiff in error that the complaint fails to allege scienter. The complaint alleges the representations of Bullis and Barse as made *knowingly, falsely,* and *fraudulently, and with a view* of obtaining money through their fraudulent scheme, and the findings of the Court established that such representations were so made with intent to deceive, and that Bullis and Barse thereby obtained the money of the plaintiff and his co-bondholders. All of the elements are present which are requisite to entitle the plaintiff to an order of arrest and a body execution against Bullis and Barse. It follows that the debt was created by means of, and the judgment was obtained for, "a fraud involving moral turpitude and intentional wrong," and that the plaintiff in error is not entitled to a discharge from the judgment.

Ames *v.* Moir, 138 U. S., 306;
Forsyth *v.* Vehmeyer, *supra;*
Hoyt *v.* Godfrey, 88 N. Y., 669;
Pacific Mutual Ins. Co. *v.* Machado, 16 Abb., 451;
Caldwell's Case, 35 Barb., 444;
Brandenburg on Bankruptcy, Sec. 434;
In re Lewensohn, 99 Fed., 73;
Brackett *v.* Griswold, 112 N. Y., 454.

Upon the argument before the Court of Appeals, when the denial of Bullis's petition for discharge from the judgment was up for review, counsel for Bullis reversed his position upon the trial as to the right of Bullis and Barse to a jury, for the reason that the cause of action stated in the complaint was for fraud, and contended that since the Court denied his motion for a jury trial, the cause of action was not for fraud, but simply on contract for specific performance. The decisions upon the trials of the case do not show that a jury trial would not have been granted if a motion therefor had been made at the proper time, but that the motion was properly denied when made immediately after the case had been called for trial. No

motion for a trial by jury was made at a time when the Court could have entertained the same.

O'Beirne *v.* Bullis, 158 N. Y., 466, 469.

Counsel for the plaintiff in error refer to the absence from the contracts of October 8th and December 9, 1889, of definite descriptions of the lands, and remark that it never has been made clear that this fact was not fatal to the case. This objection was made the basis of the entire argument of Mr. Milburn of counsel for Bullis in the Court of Appeals, and in reply the attention of the Court was directed to the fact that by the allegations of the complaint the several contracts and the mortgage, in which latter the lands were specifically described, constituted one plan or scheme (fols. 35, 40, 44, 45), and this is not denied and is consequently admitted by the answer (fols. 429, 459). The Court did not deem the objection worthy of serious consideration.

WHETHER THE CASE BE CONSIDERED UNDER SUBDIVISION 2 OR SUBDIVISION 4 OF SECTION 17 OF THE BANKRUPTCY ACT, THE PLAINTIFF IN ERROR IS NOT ENTITLED TO HIS DISCHARGE FROM THE JUDGMENT.

A consideration of the several Bankruptcy Acts and a study of the decisions of the Courts construing the same, convince the mind that neither Congress nor the Courts have ever intended that Acts designed to be beneficent toward the unfortunate and worthy should become instruments of protection to those guilty of the perpetration of "*an atrocious fraud.*"

The Bankruptcy Act of 1867 (U. S. R. S., Sec. 5117), provided:

"No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation, as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved and the dividend thereon shall be payment on account of such debt."

Nearly identical words are used in the Act of 1898 (Sec. 17, Sub. 4):

"Sec. 17. Debts not affected by a discharge. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The Act of 1898 excepts "(2) judgments in actions for frauds, or obtaining property by false pretenses or false representations, etc."

The Act of February 5, 1903, excepts from provable debts discharged, "(2) * * * *liabilities* for obtaining property by false pretenses, or false representations," etc.

Subdivision 4 remains the same.

The Courts have refused to recognize the restrictive effect of the word "judgments" in the Act of 1898 upon the word "debt" in the Act of 1867. BROWN, J., *In Re* Lewensohn, *supra* (S. D., N. Y.), at page 74, said:

"If a judgment is necessary to prevent the discharge from *barring the debt* a proseccution of the suit to judgment should be allowed; *since the essential nature of the claim, if the charges of false representation are sustained, makes it one which evidently was not designed to be barred.*"

This decision was followed by a case (*In re* Cole, 5 Am. B. R., 780; 106 Fed., 837), decided in March, 1901, by HAZEL, J. (W. D., N. Y.).

Says the learned Court (106 Fed., p. 837):

"It is claimed by the plaintiff in her complaint that the bankrupt has by fraudulent representations defrauded her out of certain real estate in the complaint described to her damage of $8,000. If plaintiff is permitted to proceed and is successful in securing a judgment, it is clear that her judgment would not be dischargeable in bankruptcy under Bankruptcy Act, Sec. 17, Subsection 2. It is strongly urged that the claim as set out in the schedule is provable and is not within the exceptions mentioned in Section 17 and that it may be liquidated

by order of this Court as provided by Section 63b; that this claim or debt is as yet simply a cause of action, if anything, and not having been reduced to judgment could be proved and is dischargeable in bankruptcy. I have examined *In re* Rhutassel (D. C.), 96 Fed., 597, and other authorities cited by counsel, *but I am unable to convince myself that Congress intended that a claim of this nature—one arising from the fraud of the bankrupt—is dischargeable in bankruptcy,* when concededly a judgment for a claim of this character is not released by a discharge. I am disposed to agree with the opinion of Judge BROWN, as expressed *In re* Lewensohn (D. C.), 99 Fed., 73" (quoting opinion as given *ante*).

See also, *In re* Moreau Lieber, 3 Am. B. R., 217; *In re* Thomas, 1 Am. B. R., 515.

In the case at bar, the judgment is both for fraud and for obtaining property by false representations, and the debt upon which the judgment was obtained was created by the fraud of the bankrupt, and therefore it is excepted from the operation of the Bankruptcy Act, by the provisions of both Subdivision 2 and Subdivision 4 of Section 17.

A.—THE JUDGMENT IS EXCEPTED UNDER THE PROVISIONS OF SUBDIVISION 2 OF SECTION 17 EXCEPTING JUDGMENTS IN ACTIONS FOR FRAUDS, OR OBTAINING PROPERTY BY FALSE PRETENSES OR FALSE REPRESENTATIONS.

The idea that the exception of Subdivision 2 relates only to actions for deceit is preposterous because of the very force of the terms employed. Congress was careful to say "actions for frauds" and not "actions of fraud" or "actions in deceit." The meaning of this is simple. "Actions designed to remedy frauds" was what was intended as clearly as that idea can be expressed in ordinary English. To say that the original fraud becomes expurged by the formal judgment behind which no inquiry may be made, is frivolous both as matter of the direct inspection of the Act and also under the adjudications already made.

Says Brandenburg in his work on Bankruptcy (2nd Ed.), at p. 275:

"Judgments in actions for fraud or obtaining property by false pretences or false representations are excepted from the operation of a discharge; and the cause of action does not become merged in a judgment thereon, so as to preclude the plaintiff from showing *that the original debt was created in fraud.*"

In support of the text the author cites

Packer *v.* Whittier, 91 Fed., 511.
In re Pettis, Fed. Cas., No. 11,046.
Warner *v.* Cronkhite, Fed. Cas., No. 17,180.

See also cases cited *ante.*

The result is that in this case the Court should not merely consider the judgment itself, but should examine the entire judgment roll, to find whether the suit was brought to remedy a fraud; and if it should find the existence of such fraud at the root of the cause of action, then under established law, whether the Court should hold Subdivision 4 of Sec. 17 to be applicable, or should decide that the plaintiff, O'Beirne, and the Trust Company must rest their objection upon Subdivision 2 of that section, the motion for a discharge of the judgment in question must be denied.

That the complaint prayed relief, not only (as stated by counsel below) for specific performance, but also for damages in the alternative, does not affect our position. The cause of action for specific performance or damages is based, as was well and repeatedly held by the Court of Appeals *upon the fraudulent representations* of Bullis and Barse. Counsel in the proceedings in New York State seemed to lose sight of the distinction between the basis upon which a suit may be brought and the relief sought. *The Bankruptcy Acts look to the substance of the injury underlying the cause of action and not the particular kind of relief which may be obtained.* Hence all such cases as McDonough *v.* Dillingham, 43 Hun, 493, and Stitt

v. Little, 63 N. Y., 427, have no application here. The latter case holds merely that as a generl rule *proof* (not allegation), which is abundant in this case, as the findings show, that the plaintiff relied upon the representations which were untrue and made with fraudulent intent, is necessary to support the action at law and construes a complaint with respect to technical rules upon which a common law action in deceit may be based.

In the Courts of New York counsel were in total error in their claims in this regard, as is shown, among other authorities, by the case of Frey *v.* Torrey, 70 App. Div., 166, where LAUGHLIN, J., for the First Appellate Division (at p. 171), said:

"The claimant may sue on contract, and if the discharge in bankruptcy be pleaded he may in rebuttal show that the debt was created by fraud *not to change his cause of action from contract to fraud,* BUT TO PREVENT ITS BEING BARRED BY THE DISCHARGE IN BANKRUPTCY (*Argall* v. *Jacobs,* 87 N. Y., 110; *Schroeder* v. *Frey,* 60 Hun, 58; aff'd 131 N. Y., 562; *Stewart* v. *Emerson,* 52 N. H., 301; Brandenburg on Bankruptcy, § 273)."

This suit was in equity as to form, but was brought to remedy a wrong wrought by a fraud, and no other authority is needed, we apprehend, to show that equity has concurrent jurisdiction with law in cases of fraud, than the decisions cited *ante* and the rulings of the Court of Appeals sustaining the jurisdiction herein and awarding damages for the fraud as prayed.

It is, we think, elementary that specific performance may in some cases be an appropriate remedy where the claim rests in fraud as well as where there is no fraud. It is merely the remedy, and is neither the nature of the claim nor the cause of action itself.

Counsel have persisted in the New York Courts in ignoring the allegations of fraud stated in the complaint, as well as the alternative relief prayed, *i. e.*, damages for *fraud,* and attempted to distort the ruling of the New York Courts into a

decision that the action was for *specific performance*, without any basis of actual fraud. The desperate character of this attempt to defeat the ends of justice on the part of Bullis leads us merely to suggest that the Court consider the opinions in the case. We feel well assured that our best argument lies in such an examination.

B. THE DEBT OF THE PLAINTIFF IN ERROR UPON WHICH THE JUDGMENT WAS OBTAINED IS EXCEPTED FROM THE BANKRUPT'S DISCHARGE IN BANKRUPTCY UNDER SUBDIVISION 4 OF SECTION 17, BECAUSE IT WAS "CREATED BY HIS FRAUD."

The words of the statute are:

"Sec. 17. Debts not affected by a discharge. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud, embezlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The alternatives are clearly expressed between the commas. The *debts* excepted are such as "were created,"

(1) by his (the bankrupt's) fraud;

(2) by his embezzlement;

(3) by his misappropriation;

(4) by his defalcation (*a*) while acting as an officer or (*b*) in any fiduciary capacity.

In construing this subdivision it is noteworthy that a comma occurs between the words "misappropriation" and "or," a phase of punctuation not correctly adopted in case the words "while acting as an officer" were intended to modify any of the substantives preceding the word "defalcation"; which, by the way, is a word aptly, if not exclusively, adapted to official acts, as contra-distinguished from private acts, to which latter class the terms "fraud," "embezzlement" and

"misappropriation" are usually applied. The absence of a comma after "officer" naturally causes the word "defalcation" to be modified also by "in any fiduciary capacity." The Appellate Division did not acquiesce in all the respondent's theory of grammatical construction, but inclined to the view that the words "fraud," "embezzlement," and "misappropriation" were equally with the word "defalcation" modified by the remainder of the clause.

The grammatical construction of this subdivision has come under the notice of the Appellate Division for the First Judicial Department. Said LAUGHLIN, J., for that tribunal, in the case of Frey *v.* Torrey, 70 App. Div., 166 (at 169):

"If the words 'fraud,' 'embezzlement' and 'misappropriation' are all qualified by the clause 'while acting as an officer or in any fiduciary capacity,' it is difficult to see the purpose of the use of the word 'fraud' at all."

It is submitted that this view is correct both as matter of technical construction of words and as consonant with complete justice.

In re Butts, 10 Am. B. R., 16, 120 Fed., 966 (N. D., N. Y.), RAY, J., who was Chairman of the House Committee on Judiciary at the time of the passage of the Act of 1898, says, at pages 19-21 and 969-970:

"In Frey *v.* Torrey, 8 Am. B. R., 196, 70 App. Div., 166, 75 N. Y. Supp., 40, it was held:

'The words 'while acting as an officer or in any fiduciary capacity,' used in Subdivision 4 of Section 17 of the United States Bankruptcy Law, excepting from the operation of the discharge in bankruptcy an indebtedness 'created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity,'' do not qualify the words 'fraud,' 'embezzlement,' and 'misappropriation,' but only the word 'defalcation.'

That Subdivision 4 of Section 17 is open to both constructions is a matter of regret. If this subdivision had been made to read, 'or were created by his fraud, embezzlement, or misappropriation, or were created by his defalcation while acting

as an officer or in any fiduciary capacity,' there would be no question that the words 'while acting as an officer or in any fiduciary capacity' would only qualify or apply to the word 'defalcation.'' Or if the subdivision had been made to read, 'or were created by his fraud, embezzlement, or misappropriation, or were created by his fraud, embezzlement, or misappropriation or defalcation while acting as an officer or in any fiduciary capacity,' there would be no question that debts created by fraud or embezzlement or misappropriation or defalcation would not be affected by a discharge in bankruptcy, irrespective of the existence of the technical trust or fiduciary relation.

The framing of this subdivision was a matter of great difference of opinion, and the words used are the result of an agreement between those who insisted that debts created by fraud, embezzlement and misappropriation, irrespective of the existence of the technical trust relation, should not be affected by the discharge, and those who insisted they should be. It was contended that debts created by fraud, by embezzlement, or by misappropriation should not be affected by the discharge in bankruptcy. Indeed, it is difficult to see why they should be. The existence or non-existence of the technical trust or fiduciary relation would seem to be immaterial so far as the moral turpitude is concerned. Is there any good reason why the executor, trustee of an express trust, or guardian of an infant should be refused a discharge if he embezzles or misappropriates the funds entrusted to him, when the person who does not occupy these technical trust or fiduciary positions may embezzle or misappropriate the funds or property intrusted to him and be discharged from the debt thus created in bankruptcy proceedings? If there is a debt existing for property or money embezzled or misappropriated by a person occupying the technical fiduciary position, there is a 'defalcation,' for the money or property is gone, and has not been made good. 'Defalcation while acting as an officer or in any fiduciary capacity' would seem to imply and include either embezzlement or misappropriation or both. It was supposed that the use of the language employed would forbid the discharge of any person from a debt created by his fraud, or by his embezzlement or misappropriation of funds or property, in whatsoever capacity or relation acting, and also the debts created by the defalcation of an officer or person occupying the technical trust or fiduciary relations known to and recognized by our law. It must be conceded, however, that the word

'defalcation' is broader than 'embezzlement' or 'misappropriation.' Neither class of debts so created should be construed out of the section providing what debts shall not be affected by a discharge."

The Courts have been reluctant to put upon the Acts of Congress a construction which could not have been intended, and which will have the effect of relieving fraudulent debtors from the just consequences of their wrongful deeds. The English Courts have long been outspoken in excluding from the benefit of Bankruptcy Acts those who committed wrong in the manner of creating debts.

3 Term Rep., 539.
Cook's Bankruptcy Law, 223.
Parker *v.* Norton, 6 Term R., 695.
Goodtitle *v.* North, 2 Doug., 583.

Said LAWRENCE, J., in the case of Parker *v.* Norton, 6 Term Rep., at 701:

"The bankrupt laws were intended to protect the bankrupts from all suits on contracts entered into previous to his bankruptcy on his giving up all of his property for the benefit of his creditors; *but it was not the object of those laws to protect the bankrupt from the consequences of gross frauds like the present.*"

Counsel for plaintiff in error in his brief has cited with reliance the case of Burnham *v.* Pidcock, 58 App. Div., 273.

That case passed only on Subdivision 2, of Section 17, of the Act of 1898, and that with respect to *a case where no actual fraud appeared* as the underlying basis of the suit, the cause of action for conversion being inconsistent with such actual fraud and proceeding only on the theory of constructive fraud. *There was a formal waiver of actual fraud, and if any were shown it would be regarded as purely incidental.* We do not contend here that cases of constructive fraud are excepted from the operation of a discharge in bankruptcy; but we do insist that actual fraud is shown in this record, and that actual

fraud was the basis of the cause of action. It has not been waived by any inconsistent form of action and therefore cannot be claimed to be immaterial or incidental. If we are correct in this, the case of Burnham *v.* Pidcock is no authority for the bankrupt's petition here. It is, however, an authority to the effect that the opinion must be received in evidence (see head note) in determining the question of fraud; from which it follows that the form of the complaint is not decisive upon the point.

Emphasis is also placed by counsel on the case of Hargadine-McKittrick D. G. Co. *v.* Hudson, 111 Fed., 361. In that case the action was one of debt on a judgment rendered in a State court in Texas. The defendant pleaded his discharge in bankruptcy granted in a District Court of the United States for the District of Colorado. The suit was brought in the United States Circuit Court in Missouri. The plaintiff contended that the foundation of the judgment sued on was created by the fraud of the defendant and he set forth the facts constituting the fraud. The judgment, however, upon which suit was brought was upon an action upon a promissory note. It did not appear anywhere in the record that there was any fraud in the inception of the action. There was a formal waiver of actual fraud and the suit was brought in the "usual and ordinary form" upon a promissory note. The plain distinction between that case and the case at Bar, is that actual fraud is shown throughout this record and actual fraud is the basis of the action, while in the above mentioned case the *record* nowhere shows that there was fraud in its inception.

The case *In re* Rhutassel, 96 Fed., 597, is likewise not in point for the same reasons. As stated by the Court, Shiras, D. J., and quoted by counsel in his brief, "In other words the judgment rendered, *in connection with the pleadings upon which it is based,* must establish the fact that the claim sued on and mentioned in the judgment, was created through fraud or by false pretenses or by willful and malicious injury to the

property of another * * *" It is also stated by Mr. Justice Shiras (page 599) "That the *judgment* does not show that the debt upon which it is based was created by fraud or by false statements."

In the present action the judgment, and the pleadings upon which it is based do establish the fact that the claim sued on was created through *fraud*.

Other cases cited by counsel will be briefly referred to.

The case of Mo. S. & L. *vs.* Rice, 84 Fed., 131, is not in point, because in that case, as is stated in the opinion quoted by counsel for plaintiff in error, it was not an "action for relief on the ground of fraud."

The present case has, we submit, been conclusively shown to be an action in equity for relief on the ground of fraud.

The question of fraud nowhere enters into the case of Slaughter *vs.* Co. F. & C., 119 Fed., 588. It is merely one of election of remedies between a suit for damages and one for specific performance.

In Bixby *v.* Wood, 24 N. Y., 607, no fraud was shown, and the only point of the decision was whether in an action for the recovery of money paid on fraudulent representations and no fraud is made out, the cause of action is assignable.

In Oatley *v.* Lewine, 47 Barb., 18, it was expressly stated (p. 21) that the action was brought "not upon the ground that the defendant was not the owner or falsely represented himself to be the owner" of certain property in question.

A similar failure to show fraud occurred in Chesterman *v.* Gardiner, 5 Johns. Ch., 27, with the additional circumstance that the plaintiff had waived all his rights.

In Lawrence *v.* Harrington, 122 N. Y., 408, the fraud was clearly held to be constructive only.

In Brown *v.* Roach, 52 Miss., 536, the Court said:

"But when closely analyzed it is not clear to see precisely how the plaintiffs were damnified by the acts complained of."

In Frances *v.* N. Y. &c. R. Co., 17 Abb. N. C., 1, the representations were very doubtful, and, to the mind of the Court, if made at all were not in any sense statements of facts.

Here the representations as to location, title, encumbrance, timber producing qualities, etc., were all statements of existing facts. The land was actually pointed out, although falsely, and the record, particularly the findings, show in great detail the magnitude of the fraud perpetrated. To say that this fraud was not actual fraud, and that Bullis and Barse were morally innocent of the effect of the false representations made by them is so amply refuted by the findings of the Special Term that we submit the question of fact in full confidence. Mr. Justice FOLLETT's characterization of the fraud as "atrocious" hardly applies to constructive fraud, and Mr. Justice BARRETT adopts this characterization as fitting the whole case after Bullis and Barse had testified.

In Sparman *v.* Keim, 83 N. Y., 245, "the representations were *promissory* and matter of opinion." There was nothing therein to deserve the characterization of "AN ATROCIOUS FRAUD" with which the courts have branded the acts of the plaintiff in error.

It is therefore respectfully submitted that the writ of error should be dismissed.

FRANK SULLIVAN SMITH,
Attorney for James R. O'Beirne,
Defendant in error.

The defendant in error, Central Trust Company of New York, submits its case upon the foregoing argument.

ADRIAN H. JOLINE,
Attorney for Deft. in Error,
Central Trust Company of New York.